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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 484

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES E. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE S. MARSHALL, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1937
CERTIORARI GRANTED NOVEMBER 8, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 484

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VS.

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1 Before United States Board of Tax Appeals

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances:
For Petitioner: James L. Banks, Jr., Esq.
For Respondent: Ralph F. Staubly, Esq., Frank T. Horner, Esq.

1935

Feb. 7—Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 7—Copy of petition served on General Counsel.
Apr. 6—Answer filed by General Counsel.
Apr. 11—Copy of answer served on taxpayer.
June 25—Motion for leave to amend answer filed by General Counsel—amendment tendered.
June 27—Motion for leave to amend answer granted.
2 July 3—Reply to amended answer filed by taxpayer.
July 13—Stipulation of facts filed.
July 18—Stipulation to submit case on pleadings and stipulation of facts; to set for oral argument and that parties be given privilege of filing briefs, filed.
July 20—Hearing set July 31, 1935.
July 31—Hearing had before Mr. Morris on merits—submitted. Briefs due 8/31/35—replies due Sept. 20, 1935.
Aug. 7—Transcript of hearing of July 31, 1935 filed.
Aug. 31—Brief filed by taxpayer.
Aug. 31—Brief filed by General Counsel.
Sept. 18—Reply brief filed by General Counsel.
Sept. 20—Reply brief filed by taxpayer. 9/20/35 copy served on General Counsel.,

1936

Oct. 20—Memorandum opinion rendered—Logan Morris, Division 14. Judgment will be entered for the petitioner.
Oct. 21—Decision entered—Division 14, Logan Morris.
3 1937
Jan. 13—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
Jan. 25—Proof of service filed by General Counsel (2).
Feb. 25—Praecipe with proof of service thereon filed by General Counsel—no counter praecipe will be filed

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "MT-ET-Cl-6296-3d New York, Estate of Josephine B. Marshall, Date of death—June 4, 1933", dated January 17, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is administrator of the Estate of Josephine B. Marshall, deceased, with office at 30 Broad Street, New York, N. Y. Letters of Administration upon said estate were granted to petitioner by the Surrogate's Court in and for the County of New York on March 12, 1934, as appears from the certificate hereto attached and marked "Exhibit A."

2. The notice of deficiency (a copy of which is attached and marked "Exhibit B")was mailed to the petitioner on January 17, 1935.

5 3. The taxes in controversy are estate taxes in respect of the above named decedent, who died on June 4, 1933, and for Forty thousand eight hundred fifty-eight and 34/100 Dollars, ($40,858.34).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The Commissioner erred in determining that the item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) representing the value as of the date of the decedent's death of securities transferred by the decedent to her son, Charles H. Marshall, in 1920, should be included in the decedent's gross estate, whereas the Commissioner should have determined that the said item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) should not have been included in decedent's gross estate.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. Decedent died intestate on June 4, 1933, in New York City, aged seventy-four years. The immediate cause of death was cancer, from which she had been suffering for about a year and a half prior to her death. Up to that time decedent had been in good health and possessed extraordinary vitality.

B. Decedent was the life beneficiary of certain trusts under
6 the will of her husband the late Charles H. Marshall of New York City, who died in 1912. The income from these trusts in 1920, the year in which decedent made the transfer hereinafter mentioned, was approximately Seventeen thousand five hundred Dollars ($17,500). At that time decedent also owned outright certain securities of a then value of approximately Four hundred twenty thousand Dollars ($420,000).

C. Following her husband's death, decedent had been in the habit of spending portions of each year in London but up to 1920 had never

been assessed for British income taxes. In November 1920, decedent, not in contemplation of death but actuated solely by her desire to reduce as much as possible her liability for British income taxes should she ever be assessed therefor as she subsequently was, transferred to petitioner the securities above referred to which she then owned outright. This transfer was evidenced by a bill of sale executed in London, England, on November 15, 1920, (Exhibit A to return) and shortly thereafter all of the shares of stock and registered bonds included in the securities transferred and standing in decedent's name were transferred to petitioner's name.

D. Simultaneously with the transfer above mentioned decedent entered into an agreement with petitioner (Exhibit B to return). This agreement provided that the securities transferred to petitioner and any reinvestments of such securities sold should be carried in a Special Account to be known as "Charles H. Marshall Special Account" or by some other similar name (paragraph II), that
7 petitioner should pay over to decedent such portion of the income from the securities as she should from time to time request (paragraph I), and that petitioner should bequeath the securities in the Special Account to decedent should she survive him (paragraph III). The agreement further provided that decedent would reimburse petitioner for the increased amount of any Federal or State income taxes payable by him as a result of the transfer (paragraph IV) and that should she survive petitioner she would pay his executors upon the transfer to her of the securities the amount of any Federal or State inheritance taxes resulting therefrom (paragraph V).

E. Prior to the transfer in 1920 decedent included the income from the securities transferred to petitioner in her own Federal income tax returns and paid the taxes due on such income. Ever since the transfer in 1920, petitioner has included the income derived from the Special Account in his Federal income tax returns and has paid the taxes due on such income. Inasmuch as petitioner's income, exclusive of his income from the Special Account, is substantial in amount, the result has been that since 1920 the Government has collected from petitioner considerably more in income taxes from the securities in the Special Account than it would have received on the same securities had decedent not transferred them.

F. During decedent's life petitioner from time to time paid to her or for her account, in accordance with paragraph I of the agreement of November 15, 1920, above mentioned, such portions
8 of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances, the only assessments having been in respect of income paid to decedent or for her account from the trusts under her husband's will above referred to.

G. Pursuant to the undertaking above referred to, contained in paragraph III of the agreement of November 15, 1920, petitioner executed a will early in December 1920, bequeathing to his mother

the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

Wherefore, the petitioner prays that the Board may hear the proceeding and find that the item of Four hundred sixty-eight thousand one hundred fifteen and 07/100 Dollars ($468,115.07) should not be included in decedent's gross estate.

JAMES L. BANKS, JR.,
Counsel for Petitioner, Charles H. Marshall, as administrator, as aforesaid, No. 70 Pine Street, New York, N. Y.

9 [*Duly sworn to by Charles H. Marshall; jurat omitted in printing.*]

10 *Exhibit A to petition*

No. 393235

The People of the State of New York, to all to whom these presents shall come or may concern, send Greeting:

Know ye, that we, having inspected the Records of our Surrogate's Court, in and for the County of New York, do find that on the 12th day of March in the year one thousand nine hundred and thirty-four by said Court, Letters of Administration of the goods, chattels, and credits of Josephine B. Marshall, late of the County of New York, deceased, were granted unto

Charles H. Marshall of the County of New York, and that it does not appear by said Records that said Letters have been revoked.

In testimony whereof, we have caused the Seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon. James A. Foley, a Surrogate of our said County, in the City of New York, the 6th day of February in the year of our Lord one thousand nine hundred and thirty-five.

[SEAL] CHARLES P. SHERIDAN,
Clerk of the Surrogate's Court.

These letters authorize the collection of a total of $24,000. The collection in excess of that amount must be authorized by a further order of the Surrogate upon the filing of an additional bond.

[SEAL]

11 *Exhibit B to petition*

MT-ET-Cl-6296-3d New York.
Estate of Josephine B. Marshall.
Dated of death—June 4, 1933.

JAN. 17, 1935.

CHARLES H. MARSHALL, *Administrator,*
30 Broad Street, New York, New York.

SIR: A deficiency of $40,853.34 in the Federal estate tax liability of the above-named estate has been determined after a review of the

file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you asquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

12 The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) D. S. BLISS,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.

13 MT-ET-Cl-6296-3d New York

Estate of Josephine B. Marshall

The protest is made against the inclusion in the decedent's gross estate of a transfer of $468,115.07. Evidence at hand indicates that the decedent on November 4, 1920, entered into an agreement with Charles H. Marshall whereby the particular securities referred to in that agreement were transferred to a special account known as the Charles H. Marshall Special Account. The agreement provided that in the event the said Charles H. Marshall predeceased the decedent, the securities deposited in the special account should revert to her.

The question here involved is specifically covered by Article 17 of Regulations 80, and accordingly, no adjustment is warranted.

The tax liability of this estate is shown by the following computation which is hereby made final:

	Returned	Tentatively determined	Determined
Gross estate	$23,450.05	$491,565.12	$491,565.12
Deductions (1926 Act)	104,193.29	104,193.29	104,193.29
Net estate (1926 Act)	$ 0.00	$387,371.83	$387,371.83
Gross estate	$23,450.05	$491,565.12	$491,565.12
Deductions (1932 Act)	54,193.29	54,193.29	54,193.29
Net estate (1932 Act)	$ 0.00	$437,371.83	$437,371.83
Gross tax (1926 Act)	$ 0.00	$11,994.87	$11,994.87
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00	0.00
Net tax (1926 Act)	$ 0.00	$11,994.87	$11,994.87
14 Total gross taxes (1926 and 1932 Acts)	$ 0.00	$40,858.34	$40,858.34
Gross tax (1926 Act)	0.00	11,994.87	11,994.87
Net Additional tax	$ 0.00	$28,863.47	$28,863.47
Net tax (1926 Act)	0.00	11,994.87	11,994.87
Total net tax	$ 0.00	$40,858.34	$40,858.34
Deficiency			$40,858.34

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals $31,262.44 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations No. 80. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

15 Before United States Board of Tax Appeals

[Title omitted.]

Amended answer

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in amended answer to the petition of the above-named taxpayer, admits, denies, and avers as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are estate taxes in respect of the above-named decedent, who died on June 4, 1933, and denies all other allegations contained in said paragraph 3.

4. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph 4 of the petition.

5, A. Admits so much of subdivision A of paragraph 5 of
16 the petition as alleges that decedent died intestate on June 4, 1933, in New York City and denies all other allegations contained in said subdivision A, of paragraph 5 of the petition.

B, C, D, E, F, and G. Denies the allegations contained in subdivisions B to G, inclusive, of paragraph 5 of the petition.

6. Respondent avers that the value of the property transferred by the decedent to her son, Charles H. Marshall, petitioner herein, in 1920, pursuant to and for the purpose provided for in the written instruments executed between the decedent and her son under date of November 15, 1920, is subject to be included in the value of the decedent's estate pursuant to the provisions of subdivisions (a), (b), and/or (c) of Section 302 of the Revenue Act of 1926 as property of which the decedent died possessed and/or respecting which she made a transfer in contemplation of and/or intended to take effect in possession or enjoyment at or after her death.

7. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) Robert H. Jackson,
ROBERT H. JACKSON.
Assistant General Counsel for the Bureau of Internal Revenue.

Of counsel:

FRANK T. HORNER,
Special Attorney, Bureau of Internal Revenue.

RFS/nc.
6/24/35.

17 Before United States Board of Tax Appeals

[Title omitted.]

Reply

The above named petitioner for his reply to the amended answer of the Commissioner of Internal Revenue alleges as follows:

6. Replying to paragraph 6 of the amended answer, he admits that the property therein referred to was transferred by the decedent to her son, Charles H. Marshall, the petitioner, in 1920, by an instrument (Exhibit A to Return) executed by decedent on November 15, 1920, as set forth in subdivision (C) of paragraph 5 of the petition, but, except as so admitted, he denies each and every allegation of said paragraph 6. Further replying to said paragraph 6, petitioner alleges that the immediate, impelling, controlling and sole motive and purpose of the transfer was decedent's apprehension of

British income taxes and her desire to reduce her liability for such taxes should she ever be assessed therefor.

18 Wherefore, petitioner prays that the Board may hear the proceeding and find that the value of the transferred property involved in the assignment of error as set forth in paragraph 4 of the petition should not be included in decedent's gross estate.

JAMES L. BANKS, JR.,
Counsel for Petitioner.
CHARLES H. MARSHALL,
as Administrator,
No. 70 Pine Street,
New York, N. Y.

[*Duly sworn to by James L. Banks, Jr.; jurat omitted in printing.*]

20 Before United States Board of Tax Appeals

Title omitted.

Stipulation of facts

It is hereby stipulated by and between the above named petitioner, by his attorney, James L. Banks, Jr., and the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue, that the following facts are true and that the Board, subject to the exception hereinafter noted, may incorporate the same into its finding of facts, subject to the right of either party to introduce additional evidence not inconsistent herewith.

(1) The petitioner is administrator of the Estate of Josephine B. Marshall, deceased, who died intestate in New York City on June 4, 1933, aged 74 years, a citizen of the United States and a resident of New York City. Letters of administration upon decedent's estate were granted to petitioner by the Surrogate's Court of New York County on March 12, 1934, as appears from the certificate attached to the petition on the file with the Board.

21 (2) The notice of deficiency, a true copy of which is attached to the petition, was mailed on January 17, 1935. Said notice of deficiency proposed an assessment of estate taxes in the amount of $40,858.34.

(3) The deficiency proposed in the notice of deficiency rests upon the determination by the Commissioner of Internal Revenue that an item of $468,115.07, representing the value as of the date of decedent's death of certain securities, hereafter referred to, transferred by decedent to the petitioner in 1920, should be included in decedent's gross estate.

(4) The immediate cause of decedent's death was cancer, from which she had been suffering for about a year and a half prior to her death. Up to that time decedent had been in good health and possessed extraordinary vitality.

(5) Decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall of New York City, who died in 1912. The income from these trusts in 1920, the year in which decedent made the transfer hereinafter referred to, was approximately $17,500. At that time decedent also owned outright certain securities, hereafter referred to, of a then value of approximately $420,000.

(6) Following her husband's death, the decedent had been in the habit of spending portions of each year in London, but up to 1920 had never been assessed for British income taxes. In November 1920, decedent, not in apprehension or expectation of death, transferred to petitioner the securities above referred to. The immediate and an impelling motive for the transfer was decedent's apprehension of British income taxes, and her desire to reduce her liability for such taxes should she ever be assessed therefor, as she subsequently was assessed upon income from sources other than the property involved in the transaction under consideration. At the time of the transfer the matter of estate or inheritance taxes was not considered. The transfer was evidenced by a writing executed in London, England, on November 15, 1920, a copy of which is hereto annexed marked Exhibit A and made a part hereof. Shortly after the transfer all of the shares of stock and registered bonds included in the securities transferred and standing in decedent's name were transferred to petitioner's name.

(7) On the same day as the transfer above referred to, i. e., November 15, 1920, decedent entered into an agreement with petitioner with reference to the securities which she had just transferred to him. This agreement, a copy of which is hereto annexed marked Exhibit B and made a part hereof, provided that the securities transferred to petitioner and any reinvestments of such securities sold should be carried in a Special Account to be known as "Charles H. Marshall Special Account" or by some other similar name (paragraph II), that petitioner should pay over to decedent such portion of the income from the securities as she should from time to time request (paragraph I), and that petitioner should bequeath the securities in the Special Account to decedent should she survive him (paragraph III). The agreement further provided that decedent would reimburse petitioner for the increased amount of any Federal or State income taxes payable by him as a result of the transfer (paragraph IV) and that should she survive petitioner she would pay his executors upon the transfer to her of the securities the amount of any Federal or State inheritance taxes resulting therefrom (paragraph V).

(8) During decedent's life petitioner from time to time paid to her or for her account, in accordance with paragraph I of the agreement of November 15, 1920, above referred to, such portions of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances,

the only assessments having been in respect of income paid to decedent or for her account from the trusts under her hubsand's will above referred to.

(9) Pursuant to the undertaking above referred to, contained in paragraph III of the agreement of November 15, 1920, petitioner executed a will early in December 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes therein should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

(10) Prior to the transfer in 1920 decedent included the income from the securities transferred to petitioner in her own Federal
24 income tax returns and paid the taxes due on such income.

Ever since the transfer in 1920, petitioner has included the income derived from the Special Account in his Federal income tax returns and has paid the taxes due on such income. Inasmuch as petitioner's income, exclusive of his income from the Special Account, is substantial in amount, the result has been that since 1920 the government has collected from petitioner over $22,500 more in income taxes from the securities in the Special Account than it would have received on the same securities had decedent not transferred them. Copies of memoranda showing the excess income taxes so paid are hereto annexed marked Exhibits C and D and made a part hereof. Exhibit C, prepared by Messrs. Boyce, Hughes, and Farrell, Certified Public Accountants, of 110 William Street, New York City, relates to the years 1924 to 1929, inclusive, 1932 and 1933, for which years that firm had charge of income tax matters for decedent and petitioner. Exhibit D, prepared by petitioner relates to the years 1921, 1922, 1923, 1930, and 1931.

Respondent objects to the facts recited in the foregoing paragraph (10) being received or considered as evidence herein on the grounds that such facts are irrelevant and immaterial, and in the event this objection be overruled, respondent requests that an exception be noted of record.

JAMES L. BANKS, Jr.,
Counsel for Petitioner.
ROBERT H. JACKSON,
Ass. General Counsel,
Bureau of Internal Revenue.

25 *Exhibit A*

Know all men by these presents, that I, Josephine Banks Marshall, residing at No. 19 Hill Street, Berkeley Square, London, England, party of the first part, for and in consideration of the sum of One Dollar ($1.00), lawful money of the United States, to me in hand paid at or before the ensealing and delivery of these presents, by Charles H. Marshall, residing at Mendham, New Jersey, party of the second part, the receipt whereof is hereby acknowledged, have bar-

gained and sold, and by these presents do grant and convey unto the said party of the second part, his executors, administrators, and assigns, all the securities and cash described in the Schedule hereunto annexed and made a part of this instrument.

To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns forever. And I do for my heirs, executors, and administrators, covenant and agree to and with the said party of the second part to warrant and defend the sale of the said securities and cash hereby sold unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons whomsoever.

In witness whereof, I have hereunto set my hand and affixed my seal this 15th day of November, One thousand nine hundred and twenty.

Signed, sealed, and delivered.

[SEAL] (sd) JOSEPHINE BANKS MARSHALL.

In the presence of:

(sd) ELIOT B. COULTER.

26 LONDON,
ENGLAND,

Consulate of the United States of America, London, England:

Be it known that on the 15th day of November 1920, before me, a Vice-Consul of the United States of America, duly commissioned and sworn, residing in the City of London, England, personally came and appeared Josephine Banks Marshall, to me known and known to me to be the person described in and who executed the foregoing instrument, and she acknowledged the said instrument to be her act and deed, and that she executed the same.

In testimony whereof, I have hereunto signed my name and affixed my seal of office the day and year last above written.

[SEAL] (sd) ELIOT B. COULTER,
Vice-Consul of the United States of America at London, England.

#12389.
($2.00 stamp cancelled.)

Schedule of Securities Owned by Josephine Banks Marshall

BONDS

27 $10,000 Interborough Rapid Transit Company, First and Refunding 5s, dated January 1, 1913, due January 1, 1966. Certificates Nos. 83321 to 83328, inclusive, 131221 and 131222. (Registered.)

$15,000 Northern Pacific-Great Northern (C. B. & Q.), Joint Collateral Trust 4s, dated July 1, 1901, due July 1, 1921, Certificates Nos. 77017 to 77024, inclusive, 77032 to 77034, inclusive, 80116, 80117, 141062, and 141063. (Coupon.)

$10,000 Lackawanna Steel Company, First Mortgage Gold 5s, dated April 1, 1903, due April 1, 1923, Certificates Nos. 7805 to 7814, inclusive. (Coupon.)

$9,000 New York Central & Hudson River Railroad Company, Refunding and Improvement 4½s, Series "A", dated October 1, 1913, due October 1, 2013. Certificates Nos. 19219, 19220, 19221, 33780, 34724 to 34728, inclusive. (Registered.)

$5,000 United States Steel Corporation, 10–60 Year Sinking Fund Gold 5s, dated April 1, 1903, due April 1, 1963. Certificates Nos. 94438, 106544, 108367, 108368, and 155246. (Coupon.)

$850 Second Liberty Loan, Convertible 4¼s, 1927-1942. Certificates Nos. C–00019578 for $50, C–01915403, D–01915404, and E–1015405 for $100 each, and E–00276990 for $500. (Coupon.)

28 $750 Third Liberty Loan, 4¼s, 1928. Certificates Nos. 5143728 for $50, 1270305 and 1270306 for $100 each, and 88759 for $500. (Coupon.)

$2,200 Fourth Liberty Loan, 4¼s, 1933–1938. Certificates Nos. 541638 and 541639 for $100 each, and 43652 and 43653 for $1,000 each. (Temporary coupon bonds.)

$500 Victory Liberty Loan, 4¾s 1922–1923. Certificate No. K–1100207. (Temporary Coupon Bond.)

$3,000 Consolidated Gas Company of New York, Five Year Convertible Gold 7s, dated February 1, 1920, due February 1, 1925. Certificates Nos. M–2736 to M–2738, inclusive. (Coupon.)

$5,000 Columbia Graphophone Manufacturing Company, Five Year 8% Gold Notes, dated August 1, 1920, due August 1, 1925, Trust Receipts Nos. 1221 to 1225, inclusive.

$9,000 French Republic 8s, due September 1, 1945. Temporary Certificates Nos. M–31828, 31830, 31834 to 31840, inclusive.

$5,000 Anaconda Copper Mining Company, Secured Gold 7s, Series "B", dated January 1, 1919, due January 1, 1929.

STOCKS

29 125 shares National Bank of Commerce, capital stock, Certificates Nos. A–5744 for 25 shares and 5915 for 100 shares.

50 shares United States Steel Corporation, preferred stock. Certificate No. C-268428.

200 shares Pennsylvania Railroad Company, capital stock, Certificates Nos. A-659443 and A-659444 for 100 shares each.

50 shares American Telegraph & Cable Company, capital stock. Certificate No. 4432.

100 shares Baltimore & Ohio Railroad Company, preferred stock. Certificate No. 13365.

300 shares Reading Company, First preferred stock. Certificates Nos. C7318 to C7320 inclusive.
71 shares Delaware & Hudson Company, capital stock, Certificates Nos. 27879 for 21 shares, 20147 for 22 shares and 44015 for 28 shares.
300 shares Southern Railway Company, preferred stock. Certificates Nos. F-9654 to F-9656, inclusive.
100 shares American Exchange National Bank, capital stock. Certificate No. 16.
40 shares American Exchange Securities Corporation, capital stock. Certificate No. O-1003.
30 122 shares Alabama Mineral Land Company, capital stock. Certificate No. 1231.
370 shares Central & South American Telegraph Company, capital stock. Certificates Nos. 4419, 4480, and 4481 for 100 shares each, and A-11124 for 70 shares.
21 shares Fidelity Phoenix Fire Insurance Company, capital stock. Certificate No. F-835.
40 shares Northern Trust Company of Superior, Wisconsin, capital stock. Certificate No. 187.

Stocks, the certificates for which are in my Account in Butler, Herrick & Marshall, 7 Wall Street, New York City, but not in my name.

100 shares Standard Oil Company of New Jersey, preferred stock.
100 shares Hodgman Rubber Company, preferred stock.
100 shares Allis-Chalmers Manufacturing Company, preferred stock.
40 shares Alabama Mineral Land Company, capital stock.
100 shares International Motor Truck Corporation, First preferred stock.
31 100 shares Lucey Manufacturing Corporation, Class A stock.
100 shares American Chicle Company, common stock.
All cash—In my account in Butler, Herrick & Marshall, amounting on November 4, 1920, to $17,363.40.

BONDS AND MORTGAGES

$21,000 B/M Albert & Lena Rosenblatt, dated June 29, 1911. Premises 136 West 117th Street, New York City. Recorded July 8, 1911, N. Y. Co. Reg. Office, Liber 294, Sec. 7, page 400 of Mortgages, Block No. 1901. Reduced to $16,000.
$20,000 B/M Isaac and Lena Wasserzug, dated February 28, 1911. Premises 12 West 113th Street, New York City. Recorded March 1, 1911, N. Y. Co. Reg. Office, Liber 274, Sec. 6, page 285 of Mortgages, Block No. 1596. Reduced to $16,800.
$20,000 B/M The Murray Estate, dated March 2, 1911. Premises 151 West 102nd Street, New York City. Recorded March 2, 1911, N. Y. Co. Reg. Office, Liber 290, page 485 of Mortgages, Block 1857. Reduced to $18,000.

$25,000 B/M Clara Straus to Frederick de P. Foster, dated
32 December 21, 1905. Premises 340 St. Nicholas Avenue, New York City. Recorded December 21, 1905, N. Y. Co. Reg. Office, Liber 199, Sec. 7, page 360 of Mortgages, Block No. 1954. Assignment, dated December 21, 1905. Reduced to $20,000.

$55,000 B/M Max Schulhof, dated April 29, 1910. Premises 226 West 108th Street, New York City. Recorded April 30, 1910, N. Y. Co. Reg. Office, Liber 280, Sec. 7, page 298 of Mortgages, Block No. 1879. Reduced to $46,500.

$26,000 B/M Adolph and Bertha Scheibel to Frederic de P. Foster, dated November 24, 1908. Premises 111 West 96th Street, New York City. Recorded November 24, 1908, N. Y. Co. Reg. Office, Liber 258, Sec. 7, page 179 of Mortgages, Block No. 1851. Assignment of $11,000 interest, dated November 24, 1908; reduced to $10,300.

33 *Exhibit B*

Agreement, made this 4th day of November 1920, between Josephine Banks Marshall, residing at 19 Hill Street, Berkeley Square, London, England, party of the first, and Charles H. Marshall, residing at Mendham, New Jersey, party of the second part, witnesseth:

Whereas, the party of the first part, by an instrument in writing, dated the 4th day of November 1920, has conveyed unto the party of the second part, the securities and cash described in the Schedule hereunto annexed and made a part hereof;

And whereas, it is the understanding of the parties of the first and second part, that in the event of the death of the party of the second part during the lifetime of the party of the first part, the said securities and cash described in the annexed Schedule or other securities of equal value shall be reconveyed to the party of the first part;

Now, therefore, in consideration of the premises and of the sum of One ($1.00) Dollar, lawful money of the United States, by each party to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and promises herein contained, it is hereby agreed as follows:

I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

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II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in

the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive
35 the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the above mentioned "Charles H. Marshall, Special Account," the amount of any State and Federal inheritance taxes due by virtue of such transfer.

VI. This agreement shall be binding upon the heirs, executors, administrators and assigns of both parties hereto.

In witness whereof the parties have hereunto set their hands and affixed their seals as of the day and year first above written.

(SD) JOSEPHINE BANKS MARSHALL.

As to Josephine Banks Marshall, in the presence of

(SD) R. E. LUGAR.

(SD) CHARLES H. MARSHALL.

As to Charles H. Marshall.

(sd) H. L. MARTIN as to CHM.

LONDON, ENGLAND,

Consulate of the United States of America, London, England:

Be it known that on the 15th day of November 1920, before
36 me, a Vice-Consul of the United States of America, duly commissioned and sworn, residing in the City of London, England, personally came and appeared Josephine Banks Marshall, to me known and known to me to be one of the persons described in and who executed the foregoing instrument, and she acknowledged the said instrument to be her act and deed, and that she executed the same.

In testimony whereof, I have hereunto signed my name and affixed my seal of office the day and year last above written.

(SD) ELIOT B. COULTER,
Vice Consul of the United States of America at London, England.

#12388.

($2. stamp cancelled.)

STATE OF NEW YORK,
County of New York, ss:

On the 4th day of November 1920, before me came Charles H. Marshall, to me known and known to me to be one of the individuals described in, and who executed, the foregoing instrument, and acknowledge to me that he executed the same.

(SD) EDWIN G. COLWELL,
Notary Public.

New York County No. 2. New York Register No. 2183. Commission Expires Mar. 30, 1922.

37 Schedule of Securities Owned by Josephine Banks Marshall

BONDS

$10,000 Interborough Rapid Transit Company, First and Refunding 5s, dated January 1, 1913, due January 1, 1966. Certificates Nos. 83321 to 83328, inclusive, 131221 and 131222. (Registered.)

$15,000 Northern Pacific-Great Northern (C. B. & Q.), Joint Collateral Trust 4s, dated July 1, 1901, due July 1, 1921. Certificates Nos. 77017 to 77024, inclusive, 77032 to 77034, inclusive, 80116, 80117, 141062 and 141063. (Coupon.)

$10,000 Lackawanna Steel Company, First Mortgage Gold 5s, dated April 1, 1903, due April 1, 1923, Certificates Nos. 7805 to 7814, inclusive. (Coupon.)

$ 9,000 New York Central & Hudson River Railroad Company, Refunding and Improvement 4½s, Series "A", dated October 1, 1913, due October 1, 2013. Certificates Nos. 19219, 19220, 19221, 33780, 34724 to 34728, inclusive. (Registered.)

$ 5,000 United States Steel Corporation, 10–60 Year Sinking Fund Gold 5s, dated April 1, 1903, due April 1, 1963. Certificates Nos. 94438, 106544, 108367, 108368 and 155246. (Coupon.)

38 $850 Second Liberty Loan, Convertible 4¼s, 1927-1942. Certificates Nos. C–00019578 for $50, C–01915403, D–01915404 and E–1015405 for $100 each, and E–00276990 for $500. (Coupon.)

$ 750 Third Liberty Loan, 4¼s, 1928. Certificates Nos. 5143728 for $50, 1270305 and 1270306 for $100 each, and 86759 for $500. (Coupon.)

$ 2,200 Fourth Liberty Loan, 4¼s, 1933–1938. Certificates Nos. 541638 and 541639 for $100 each, and 43652 and 43653 for $1,000 each. (Temporary coupon bonds.)

$ 500 Victory Liberty Loan, 4¾s, 1922–1923. Certificate No. K-1100207. (Temporary Coupon Bond.)

$ 3,000 Consolidated Gas Company of New York, Five Year Convertible Gold 7s, dated February 1, 1920, due February 1, 1925. Certificates Nos. M–2736 to M–2738, inclusive. (Coupon.)

$ 5,000 Columbia Graphophone Manufacturing Company, Five Year 8% Gold Notes, dated August 1, 1920, due August 1, 1925, Trust Receipts Nos. 1221 to 1225, inclusive.

$ 9,000 French Republic 8s, due September 1, 1945. Temporary Certificates Nos. M–31828, 31830, 31834 to 31840, inclusive.

39 $5,000 Anaconda Copper Mining Company, Secured Gold 7s, Series "B", dated January 1, 1919, due January 1, 1929.

STOCKS

125 shares National Bank of Commerce, capital stock. Certificates Nos. A–5744 for 25 shares and 5915 for 100 shares.

50 shares United States Steel Corporation, preferred stock. Certificate No. C–268428.

200 shares Pennsylvania Railroad Company capital stock. Certificates Nos. A–659443 and A–659444 for 100 shares each.

50 shares American Telegraph & Cable Company, capital stock. Certificate No. 4432.

100 shares Baltimore & Ohio Railroad Company, preferred stock. Certificate No. 13365.

300 shares Reading Company, First preferred stock. Certificates Nos. C–7318 to C–7320, inclusive.

71 shares Delaware & Hudson Company, capital stock. Certificates Nos. 27879 for 21 shares, 20147 for 22 shares and 44015 for 28 shares.

300 shares Southern Railway Company, preferred stock. Certificates Nos. F–9654 to F–9656, inclusive.

40 100 shares American Exchange National Bank, capital stock. Certificate No. 16.

40 shares American Exchange Securities Corporation, capital stock. Certificate No. O–1003.

122 shares Alabama Mineral Land Company, capital stock. Certificate No. 1231.

370 shares Central & South American Telegraph Company, capital stock. Certificates Nos. 4419, 4480, and 4481 for 100 shares each, and A–11124 for 70 shares.

21 shares Fidelity Phoenix Fire Insurance Company, capital stock. Certificate No. F–835.

40 shares Northern Trust Company of Superior, Wisconsin, capital stock. Certificate No. 187.

Stocks, the certificates for which are in my Account in Butler, Herrick & Marshall, 7 Wall Street, New York City, but not in my name.

100 shares Standard Oil Company of New Jersey, preferred stock.
100 shares Hodgman Rubber Company, preferred stock.
100 shares Allis-Chalmers Manufacturing Company, preferred stock.
41 40 shares Alabama Mineral Land Company, capital stock.
100 shares International Motor Truck Corporation, First preferred stock.
100 shares Lucey Manufacturing Corporation, Class A stock.
100 shares American Chicle Company, common stock.
All cash—In my account in Butler, Herrick & Marshall, amounting on November 4, 1920, to $17,363.40.

BONDS AND MORTGAGES

$21,000 B/M Albert & Lena Rosenblatt, dated June 29, 1911. Premises 136 West 117th Street, New York City. Recorded July 8, 1911, N. Y. Co. Reg. Office, Liber 294, Sec. 7, page 400 of Mortgages, Block No. 1901. Reduced to $16,000.

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$20,000 B/M The Murray Estate, dated March 2, 1911. Premises 151 West 102nd Street, New York City. Recorded March 2, 1911, N. Y. Co. Reg. Office, Liber 290, page 485 of Mortgages, Block 1857. Reduced to $18,000.
42

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43 *Exhibit C*

Prepared by Boyce, Hughes & Farrell, 110 William Street, New York, N. Y.

Federal income taxes

	Including special account in Charles H. Marshall return			Had special account been included with Josephine B. Marshall return instead of Charles H. Marshall return			
	Charles H. Marshall paid	Josephine B. Marshall paid	Actual payments, total	Charles H. Marshall would have paid—	Josephine B. Marshall would have paid—	On this basis the total would be—	Actual payments were greater by—
1924	$9,221.44	$140.35	$9,361.79	$3,681.19	$3,192.75	$6,793.94	$2,667.85
1925	14,431.44	165.27	14,596.71	5,578.62	5,311.95	11,889.97	3,306.74
1926	13,281.12	293.40	13,574.52	6,531.57	5,770.59	12,302.76	1,271.76
1927	17,392.41	109.94	17,502.35	8,254.69	5,698.76	13,953.45	4,158.80
1928	29,762.94	265.88	30,028.82	21,757.10	4,438.77	26,195.87	3,811.95
1929	30,541.98	144.38	30,686.36	33,944.39	2,511.89	36,456.79	5,770.43
1930							
1931							
1932		536.67	536.67		53.35	53.35	A 483.33
1933	8,556.40	143.15	8,699.55	5,677.00	B 53.52 483.69	6,228.61	2,472.94
	$122,787.73	$1,780.04	$134,567.77	$95,873.47	$37,312.58	$113,187.05	$21,380.72

A—Excess paid by Josephine B. Marshall.
B—Estate of Josephine B. Marshall.

45

Exhibit D

Prepared by Charles H. Marshall, 30 Broad Street, New York, N. Y.

	Including special account in Charles H. Marshall return			Had special account been included with Josephine B. Marshall return instead of Charles H. Marshall return			
	Charles H. Marshall paid	Josephine B. Marshall paid	Actual payments	Charles H. Marshall would have paid—	Josephine B. Marshall would have paid—	On this basis the total would be—	Actual were were greater by—
1921	$2,955.77	$685.97	$3,641.74	$2,419.44	$1,185.25	$3,554.69	$87.05
1922	3,239.87	539.36	3,779.23	2,157.73	944.99	3,102.72	676.51
1923	3,181.48	551.97	3,733.45	618.50	2,880.72	3,499.22	294.23
1930		165.27	165.27				165.27
1931				616.89		616.89	
	$9,377.12	$1,932.57	$11,309.69	$5,812.56	$4,999.96	$10,773.52	$1,183.06

46 Before United States Board of Tax Appeals

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

James L. Banks, Jr., Esq., for the petitioner.
Ralph F. Staubly, Esq., and
Frank T. Horner, Esq., for the respondent.

Memorandum opinion

MORRIS: The respondent having determined a deficiency in estate tax $40,858.34, the petitioner institutes this proceeding for its redetermination, alleging error by reason of the inclusion in the decedent's gross estate of $468,115.07, representing the value, as of the date of the decedent's death, of securities transferred by her to her son, Charles H. Marshall, in 1920.

The respondent affirmatively alleges that the value of such property is includable in the decedent's gross estate under subdivisions (a), (b), and (c) of section 302 of the Revenue Act of 1926, as property of which the decedent died possessed and respecting which she made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after her death. The petitioner's reply denies this matter, alleging that the immediate, impelling, con-
47 trolling, and sole motive and purpose of the transfer was the decedent's apprehension of British income taxes and her desire to reduce her liability for such taxes, should she ever be assessed therefor.

The petitioner is the duly appointed and acting administrator of the Estate of Josephine B. Marshall, deceased, who died, intestate, in the City of New York June 4, 1933, at the age of 74, while then a citizen of the United States and a resident of New York City. The immediate cause of her death was cancer, from which she had suffered for about a year and a half prior to her death. Up to this period of illness, however, she had been in good health and possessed extraordinary vitality.

Decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall, of New York City, who died in 1912. The income from these trusts in 1920—the year in which decedent made the transfer hereinafter referred to—was approximately $17,500. At that time she also owned certain securities outright, hereafter referred to, having a value then of approximately $420,000.

Following her husband's death, the decedent had habitually spent portions of each year in London, but up to 1920 had never been assessed for British income taxes. By instrument dated November 15, 1920, executed in London, England, on that date, she, not in apprehension or expectation of death, transferred to this petitioner certain stocks, bonds, cash and other securities listed in a scedule appended to such instrument. The immediate and an impelling notice for such transfer was her apprehension of British income taxes, and her de-
sire to reduce her liability for such taxes should she be
48 assessed therefor, as she subsequently was upon income from sources other than the property involved in the transaction under consideration. At the time of the transfer the matter of estate or inheritance taxes was not considered. Shortly after the transfer all of the shares of stock and registered bonds included in the

securities transferred and standing in decedent's name were transferred to petitioner's name.

On the same date aforesaid, i. e., November 15, 1920, the decedent entered into another agreement with the petitioner with reference to the same securities which she had just transferred to him in which—after reciting "the understanding of the parties of the first and second part (decedent and petitioner, respectively), that in the event of the death of the party of the second part during the lifetime of the party of the first part, the said securities and cash described in the annexed Schedule or other securities of equal value shall be reconveyed to the party of the first part"—it was agreed as follows:

I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

49 II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above-mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the above-mentioned "Charles H. Marshall, Special Account," the amount of any State and Federal inheritance taxes due by virtue of such transfer.

50 VI. This agreement shall be binding upon the heirs, executors, administrators, and assigns of both parties hereto.

During decedent's life, petitioner, from time to time, paid to her or for her account, in accordance with paragraph I above, such portions of the income derived from the Special Account as she requested. No British income taxes have been assessed against these remittances, the only assessments having been in respect of income

paid to decedent or for her account from the trusts under her husband's will above referred to.

Pursuant to paragraph III of the agreement above, petitioner executed a will early in December 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of petitioner's will was revoked after his mother's death in 1933.

Prior to the transfer in 1920, decedent included the income from the securities transferred to petitioner in her own Federal income tax returns and paid the tax due thereon. Since the transfer the petitioner has included the income derived from the Special Account in his returns and has paid the tax due thereon.

The parties stipulated certain facts subject to the ruling of the Board upon objection by the respondent that such facts were irrelevant and immaterial. Agreeing with the respondent that such facts are irrelevant to the question of law presented, we have excluded them from our finding.

51 The respondent contends and so alleges, that the value of the securities was properly included in the gross estate under the provisions of section 302 of the Revenue Act of 1926, either as property transferred in contemplation of death or as a transfer intended to take effect in possession or enjoyment at or after death. The amendments to this section of March 3, 1931, and by section 803 (a) of the Revenue Act of 1932 are not retroactive, consequently they have no bearing here. Flora M. Bonney et al., 29 B. T. A. 45, affirmed 75 Fed. (2) 1008, 15 A. F. T. R. 360.

We quite agree with the respondent that the state of health of the grantor at the time of the transfer is not determinative of the motive which impelled the transfer, but we cannot agree that merely the because the grantor retains one, not "all", of the attributes of ownership until death, and merely because she makes provision for the ultimate distribution thereof "by reference to death" that a transfer is in contemplation of death within the meaning of the statute. However, we need not, under the facts, dwell upon the subject at length. The decedent died of cancer in 1933. That was approximately thirteen years after the transfer. She only suffered with the disease about a year and a half prior to death. Prior to her illness she had been in good health. So that poor health is not a factor in our determination. It is stipulated that "The immediate and an impelling motive for the transfer was decedent's apprehension of British income taxes," a motive intimately associated with life, not death. Although there may have been other motives, the record does not disclose them. We are of the opinion that the record fails to

52 support, in the slightest degree, the allegation that the transfer in question was made by the decedent in contemplation of death. United States v. Wells et al., Executors, 283 U. S. 102, 9 A. F. T. R. 1440; B. Paul Mossman, Executor, 32 B. T. A. 596; Marie E. Harnischfeger et al., Executors, 31 B. T. A. 224.

Our further question is whether the transfer, in 1920—reading the two instruments together, that is, the instrument of transfer itself and the instrument providing for a reversion to the donor in the event the donee should predecease her, etc.—coupled, as it was, with an arrangement (1) by which enjoyment of the income was reserved to the donor for life and with the further arrangement (2) by which title should revert to her if she survived the grantee, was intended to take effect in possession or enjoyment at or after death, within the meaning of said section 302.

In substance, the instant case is no different from Helvering v. St. Louis Union Trust Company et al., 296 U. S. 39, 16 A. F. T. R. 985, and Becker v. St. Louis Union Trust Company et al., 296 U. S. 48, 16 A. F. T. R. 989. In the former case the decedent, who died in 1925, in 1920 created a trust in certain securities, the net income therefrom to be paid to a daughter during her life. The trustee was clothed with discretionary power to terminate the trust when, in his wisdom it should be done, the estate in such event reverting to the grantor. It was also provided that if the daughter should predecease the grantor, the trust should terminate and the estate revert to the grantor. At the death of the grantor neither of such contingencies had occurred. The respondent contended there, as he does here, that the grantor, having reserver the right to revest in
53 himself the trust property upon the happening of such contingencies, the transfer was only intended to take effect in possession or enjoyment at or after death, within the meaning of section 302 of the act. The court sustained the petitioner, thereby affirming the decision of the Circuit Court which had affirmed the Board (28 B. T. A. 107) saying:

"* * * The grantor here, by the trust instrument, left in himself no power to resume ownership, possession, or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely forthitous so far as any control, design, or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a
54 termination by the trustee of the trust during the lifetime of of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possi-

bility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility.

"It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place."

In the latter case the decedent who died in 1928, in 1921, executed certain trust declarations in favor of his children conveying, in trust, certain securities, by which it was provided, among other things, that if the beneficiaries should die before his death, the estate should revert to him and that in the event of his death the property should become the beneficiaries'. The court merely followed its decision in Helvering v. St. Louis Union Trust Company, supra, saying:

"* * * By the declaration of trust here under review, the legal title, possession, and control of the trust estate passed irrevocably from the grantor as an individual to himself as trustee. The
55 effect is no different than if the trustee had been another person. Cf. Reinecke v. Trust Co., 278 U. S. 339, 346. By the final paragraph of the declaration, quoted above, the grantor does not retain any interest in the property, but, recognizing the completeness of the transfer, he provides that the property shall revert to him in case the beneficiary shall predecease him. The provision that the trust estate shall 'revert' in case of the predecease of the beneficiary removes any doubt as to the completeness of the transfer, if otherwise there would be any. The question, therefore, is whether the mere possibility of a reverter stamps the transfer as one intended to take effect in possession or enjoyment at or after the death of the grantor. The decision just rendered answers this question in the negative."

Therefore, under those decisions the grant was as complete in 1920 as it was possible to make it, in so far as the decedent was concerned. The contingency by which there may have been a possible reversion to her and which depended not upon any power retained in the decedent as grantor but upon the subsequent event of the death of the grantee, had not occurred prior to the death of the decedent. Her death merely made it impossible for the reversion—it extended no greater property right in the corpus of the estate than had already been granted in 1920. Nor does the fact that she retained the right to receive the income from the corpus during her lifetime alter this conclusion. May v. Heiner, 281 U. S. 238, 8 A. F. T. R. 10, 904.

Judgment will be entered for the petitioner.

Entered Oct. 20, 1936.

[SEAL]

56 Before United States Board of Tax Appeals, Washington

Docket No. 78500

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered October 20, 1936, it is

Ordered and Decided: That there is no deficiency in estate tax.

Enter:

[SEAL] (Signed) LOGAN MORRIS, *Member.*

Entered Oct. 21, 1936.

57 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Frank T. Horner and Ralph F. Staubly, Special Attorneys, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue
58 of the laws of the United States; that Charles H. Marshall of New York City is the duly appointed, qualified and acting administrator of the Estate of Josephine B. Marshall, deceased; that the local address of said administrator is 30 Broad Street, New York City, New York; and that the Federal estate tax return, Form 706, executed on behalf of the decedent's estate, was filed with the Collector of Internal Revenue for the Third District of New York, whose office is located in New York City, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

That the Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit:

The decedent, Josephine B. Marshall, died intestate on June 4, 1933, a resident of New York City, State of New York. The Federal estate tax return filed on behalf of the decedent's estate disclosed no tax liability.

On November 15, 1920, the decedent executed a certain instrument of transfer whereby she transferred certain securities of the approximate value of $420,000.00 to Charles H. Marshall, respondent on review, at the same time the decedent and said Charles H. Marshall entered into an agreement with respect to such securities, pursuant to which the securities were to be held by the said Charles H.
59 Marshall in a special account during the lifetime of the decedent, the income therefrom to be paid to the decedent, with the further provision that in the event of the death of the said Charles H. Marshall during the lifetime of the decedent, the said securities should be reconveyed to the decedent.

Under date of January 17, 1935, the Commissioner of Internal Revenue mailed a notice to the administrator aforesaid, asserting a deficiency in the estate tax on the transfer of the decedent's net estate, in the amount of $40,858.34. In determining the deficiency in the tax, the Commissioner included the value of said securities aforesaid in the decedent's gross estate, pursuant to the provisions of Section 302 (c) of the Revenue Act of 1926 as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death.

Under the pleadings in this case the Commissioner, also, asserted and contended, and so alleged, that said securities aforesaid were subject to be retained in the decedent's gross estate for the purpose of the tax, pursuant to the provisions of Section 302 (a) and Section 302 (c) of said Act, as property of the decedent at the date of her death, and as property transferred in contemplation of death.

On July 3, 1935, the respondent on review filed an appeal with the United States Board of Tax Appeals from the Commissioner's determination of the deficiency as set forth in the deficiency notice aforesaid. After the answer of the Commissioner was duly filed, the case was submitted to the Board of Tax Appeals for de-
60 cision upon the pleadings and a stipulation of facts. The memorandum opinion and interlocutory decision of the Board of Tax Appeals was entered October 20, 1936, and the final order of the Board redetermining the deficiency was entered on October 21, 1936, in which it was ordered and decided that there was no deficiency in the estate tax due from the decedent's estate.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the decision of the Board of Tax Ap-

peals, and by its order redetermining the deficiency in the tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

(1) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the decedent, through the medium of the instruments of transfer, executed and delivered by her under date of November 15, 1920, then made a complete disposition of the property which was the subject of such instruments of transfer, there being no evidence to support such finding of fact.

(2) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the decedent upon the execution and
61 delivery of the instruments of transfer aforesaid did not then make a complete disposition of her right, title, interest, or estate in and to the property constituting the subject of said instrument of transfer.

(3) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the transfer effected through the medium of the instruments of transfer aforesaid was not intended to take effect in possession or enjoyment at or after the decedent's death, there being no evidence to support such finding of fact.

(4) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the aforesaid disposition effected through the medium of transfer aforesaid, was intended to take effect in possession or enjoyment at or after the decedent's death.

(5) The Board of Tax Appeals erred in holding and deciding and finding as a fact that the disposition effected through the medium of the instruments of transfer executed on November 15, 1920, as aforesaid, was not made in contemplation of death, there being no evidence to support such finding of fact.

(6) The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the disposition effected through the medium of the instruments of transfer aforesaid was made in contemplation of death.

62 (7) The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in the estate tax, instead of a deficiency of $40,858.34, as set forth in the notice of deficiency.

(8) The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is due from the decedent's estate a deficiency in the estate tax in the sum of $40,858.34, as set forth in the deficiency notice, instead of deciding that there is no deficiency in the tax.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing,

and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) ROBERT H. JACKSON,
Assistant Attorney General.
(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Of counsel:
FRANK T. HORNER,
RALPH F. STAUBLY,
Special Attorneys, Bureau of Internal Revenue.

63 [*Duly sworn to by Ralph F. Staubly; jurat omitted in printing.*]

64 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To CHARLES H. MARSHALL,
30 Broad Street, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

65 Dated this 13th day of January, 1937.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this day of January 1937.

(Sgd.) CHARLES H. MARSHALL,
Respondent on Review.

RFS/rb 1/6/37.

66 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To JAMES L. BANKS, Jr.,
70 Pine Street, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

67 Dated this 13th day of January 1937.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 14th day of January, 1937.

(Sgd.) JAMES L. BANKS, JR.,
Counsel for Respondent on Review.

RFS/rb 1/6/37.

68 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Praecipe for record

TO THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:

69 (a) Petition, including annexed copy of the deficiency notice.
(b) Amended answer filed June 25, 1935.
(c) Reply filed July 3, 1935.

3. Opinion (memorandum), and decision of the Board.
4. Petition for review, together with proof of service of notice of filing, and of service of a copy of petition for review.
5. Stipulation of facts.
6. This praecipe.

(Signed) Morrison Shafroth,
MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 23rd day of February 1937.

JAMES L. BANKS, JR.,
Attorney for Respondent on Review.

No Counter Praecipe will be filed. James L. Banks, Jr.
RFS/rb 1/26/37.

70 [Clerk's certificate to foregoing transcript omitted in printing.]

71 In United States Circuit Court of Appeals for the Second Circuit

No. 403. October Term, 1936

Argued June 9, 1937. Decided June 28, 1937

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED, RESPONDENT

Appeal from the Board of Tax Appeals

Before MANTON, SWAN, and CHASE, Circuit Judges

Petition to review the decision of the United States Board of Tax Appeals.

James W. Morris, Asst. Atty. Gen., and Sewall Key, J. Louis Monarch, and John G. Remey, Sp. Assts. to the Atty. Gen., for petitioner.

James L. Banks, Jr., of New York City, for respondent.

Opinion

Per Curiam.

Decision affirmed on the authority of Welch v. Hassett, 90 F. (2d) 833, decided June 1, 1937 (C. C. A. 1), and Bullard v. Commissioner, 90 F. (2d) 144, decided May 25, 1937 (C. C. A. 7).

72 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES H. MARSHALL, ADMNR., ETC., RESPONDENT

Judgment

Filed July 6, 1937

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

73 [File endorsement omitted.]

74 [Clerk's certificate to foregoing transcript omitted in printing.]

75 Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for hearing immediately following Nos. 349 and 375.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 41,965. U. S. Circuit Court of Appeals, Second Circuit. Term No. 484. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Charles H. Marshall, Administrator of the Estate of Josephine B. Marshall, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed October 6, 1937. Term No. 484 O. T. 1937.

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U. S. GOVERNMENT PRINTING OFFICE: 1937